U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 16 November 2005

CASE NO.: 2001-BLA-1021

In the Matter of:

WESLEY EUGENE CLARK
Claimant

v.

PEABODY COAL COMPANY
Employer

and

OLD REPUBLIC INSURANCE CO., INC.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

DECISION AND ORDER – DENYING BENEFITS ON REMAND

This matter is on remand from the Benefits Review Board. It involves a coal miner's fifth claim for Black Lung Benefits; the claim was filed on December 5, 1998. [1] Claimant acknowledged that he does not suffer from a totally disabling respiratory or pulmonary impairment under § 718.204 (DX 58, 63). Rather, Claimant seeks to prove entitlement by invoking the irrebuttable presumption of disability supplied at §718.304 (DX 58, 63).

Administrative Law Judge Robert J. Lesnick held a formal hearing in the matter on January 25, 2000 (DX 58). Judge Lesnick issued a decision denying benefits on July 31, 2000 finding that Claimant did not qualify for the presumption of total disability (DX 63). Claimant requested reconsideration of that decision. (DX 64). Judge Lesnick denied the request on September 26, 2000 (DX 65). On February 15, 2001, Claimant filed a request for modification (DX 67). The District Director transferred the matter to the Office of Administrative Law Judges

[1] The Black Lung Benefits Act, as amended, is codified at 30 USC § 901 with its implementing regulations found at Title 20 of the Code of Federal Regulations. The following abbreviations are used in this decision: DX – Director's Exhibit; EX – Employer's Exhibit; TR – hearing transcript; BCR- board certified radiologist; and B- B-reader.

to be set for hearing. (DX 72). The matter was assigned to Administrative Law Judge Gerald M. Tierney.

Judge Tierney granted Claimant's request to decide the modification issue on the record, which consisted of 72 Director's Exhibits. Judge Tierney issued a decision on April 30, 2003 that awarded Claimant benefits. Employer appealed that decision to the Benefits Review Board. On May 20, 2004, the Benefits Review Board issued a decision affirming Judge Tierney's decision in part, vacating it in part, and remanding the case to Judge Tierney for further consideration consistent with its opinion. BRB No. 03-0565 BLA.

By Order dated September 6, 2005, the parties were advised that Judge Tierney is no longer with this office and that this matter would be transferred to another Administrative Law Judge. The parties were allowed 30 days to make any objection and to submit briefs on the issues.

Thirty days passed and no objection was received. Employer resubmitted the brief it filed with Judge Tierney. This matter was transferred to the undersigned.

Section 718.304 provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if that miner is suffering from a chronic dust disease of the lung which:

> (a) When diagnosed by a chest x-ray yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C;
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by other means which could reasonably be expected to yield the results described in paragraph (a) or (b).

The condition described by the above criteria is frequently referred to as "complicated pneumoconiosis," although that term does not appear in the statute or the regulation. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999).

In deciding whether there was a mistake of fact in Judge Lesnick's decision not to invoke the § 718.304 irrebuttable presumption, Judge Tierney first considered the chest x-ray evidence under § 718.304(a). Judge Tierney pointed out that Judge Lesnick's list of chest x-ray readings did not show that Drs. Patel and Gaziano identified a Category A large opacity on the February 24, 1999 chest x-ray and that Drs. Siner and Westerfield identified a Category A opacity on the March 19, 1999, March 30, 1999, and June 24, 1999 chest x-rays. Judge Tierney found that the inclusion of these additional readings changed the balance of the readers who found a Category A large opacity. Judge Tierney further found that Judge Lesnick did not consider the progressive nature of pneumoconiosis. Assigning more weight to the most recent chest x-ray evidence, Judge Tierney found that Claimant proved the existence of complicated pneumoconiosis under § 718.304(a).

The Benefits Review Board vacated Judge Tierney's finding that Claimant established the existence of pneumoconiosis by the chest x-ray evidence under § 718.304(a). The Board found that Judge Tierney mischaracterized the chest x-ray evidence when summarizing the 1996, 1998, and 1999 readings. The Board noted a different number of readings identifying simple pneumoconiosis, complicated pneumoconiosis, and no pneumoconiosis. As both Judge Tierney and the Benefits Review Board have noted deficiencies in the summary of the chest x-ray evidence provided in Judge Lesnick's decision, I find it necessary to construct another summary of the chest x-ray evidence.[2] I will then address the issues raised by the Board, including points about the readings of Drs. Aycoth and Cappiello and Judge Tierney's reliance on the more recent chest x-ray evidence.

Exhibit	Date of X-ray	Physician/Radiological Qualifications	Impression
DX 35	3/24/95	Wheeler/BCR,B	No pneumoconiosis
DX 35	3/24/95	Scott/BCR,B	No pneumoconiosis
DX 35	3/24/95	Gayler/BCR,B	No pneumoconiosis
DX 35	6/9/95	Wheeler/BCR,B	No pneumoconiosis
DX 35	6/9/95	Scott/BCR,B	No pneumoconiosis
DX 35	6/9/95	Gayler/BCR,B	No pneumoconiosis
DX 35	6/13/95	Wheeler/BCR,B	No pneumoconiosis
DX 35	6/13/95	Scott/BCR,B	No pneumoconiosis
DX 35	6/13/95	Gayler/BCR,B	No pneumoconiosis
DX 35	6/14/95	Wheeler/BCR,B	No pneumoconiosis
DX 35	6/14/95	Scott/BCR,B	No pneumoconiosis
DX 35	6/14/95	Gayler/BCR,B	No pneumoconiosis
DX 35	6/15/95	Wheeler/BCR,B	No pneumoconiosis
DX 35	6/15/95	Scott/BCR,B	No pneumoconiosis
DX 35	6/15/95	Gayler/BCR,B	No pneumoconiosis
DX 32	2/21/96	M. Patel/BCR,A	1/0
DX 32	2/21/96	Francke/B	1/0; A
DX 32	10/23/96	Zaldivar/B	0/1
DX 35	10/23/96	Wheeler/BCR,B	No pneumoconiosis
DX 35	10/23/96	Scott/BCR,B	No pneumoconiosis
DX 35	10/23/96	Gayler/BCR,B	No pneumoconiosis
DX 36	4/16/98	Wheeler/BCR,B	No pneumoconiosis

[2] As did Judge Lesnick, I list the chest x-rays dating back to 1995, as some of the chest x-rays obtained in connection with the 1995 claim were read again and submitted in connection with the 1998 claim. Some exhibit numbers listed in Judge Lesnick's decision have changed with Claimant's filing of a modification request.

DX 36	4/16/98	Scott/BCR,B	No pneumoconiosis
DX 36	4/16/98	Gayler/BCR,B	No pneumoconiosis
DX 46	4/16/98	Fino/B	1/1
DX 55	4/16/98	Tuteur/---	No pneumoconiosis
DX 47	4/16/98	B. Patel/---	Chronic obstructive pulmonary disease; multiple small nodules
DX 36	11/2/98	Wheeler/BCR,B	No pneumoconiosis
DX 36	11/2/98	Scott/BCR,B	No pneumoconiosis
DX 36	11/2/98	Gayler/BCR,B	No pneumoconiosis
DX 46	11/2/98	Fino/B	1/1
DX 55	11/2/98	Tuteur/---	No pneumoconiosis
DX 55	11/2/98	B. Patel/---	Chronic obstructive pulmonary disease; small nodular densities
DX 13	2/24/99	Gaziano/B	2/2; A
DX 12	2/24/99	M. Patel/BCR,B	1/1; A
DX 44	2/24/99	Wheeler/BCR,B	0/1
DX 44	2/24/99	Scott/BCR,B	No pneumoconiosis
DX 44	2/24/99	Gayler/BCR,B	No pneumoconiosis
DX 59	2/24/99	Fino/B	1/1
DX 34	3/19/99	Cappiello/BCR,B	1/1; A
DX 34	3/19/99	Ahmed/BCR,B	1/2; A
DX 34	3/19/99	Miller/BCR,B	1/2; A
DX 42	3/19/99	Siner/BCR,B	1/1; A
DX 42	3/19/99	Westerfield; BCR,B	2/2; A
DX 53	3/19/99	Wheeler/BCR,B	No pneumoconiosis
DX 53	3/19/99	Scott/BCR,B	No pneumoconiosis
DX 53	3/19/99	Gayler/BCR,B	No pneumoconiosis
DX 59	3/19/99	Fino/B	1/1
DX 34	3/30/99	Cappiello/BCR,B	1/2; A
DX 34	3/30/99	Ahmed/BCR,B	1/2; A
DX 34	3/30/99	Miller/BCR,B	1/2; A
DX 42	3/30/99	Siner/BCR,B	1/1; A
DX 42	3/30/99	Westerfield/BCR,B	2/2; A
DX 53	3/30/99	Wheeler/BCR,B	No pneumoconiosis
DX 53	3/30/99	Scott/BCR,B	No pneumoconiosis
DX 53	3/30/99	Gayler/BCR,B	No pneumoconiosis
DX 59	3/30/99	Fino/B	1/1
DX 24	5/19/99	Zaldivar/B	1/1
DX 36	6/16/99	Wheeler/BCR,B	No pneumoconiosis
DX 36	6/16/99	Scott/BCR,B	No pneumoconiosis

DX 36	6/16/99	Gayler/BCR,B	No pneumoconiosis
DX 46	6/16/99	Fino/B	1/1
DX 55	6/16/99	Tuteur/---	No pneumoconiosis
DX 34	6/24/99	Cappiello/BCR,B	2/1; A
DX 34	6/24/99	Ahmed/BCR,B	1/2; A
DX 34	6/24/99	Miller/BCR,B	1/2; A
DX 42	6/24/99	Siner/BCR,B	1/1; A
DX 42	6/24/99	Westerfield/BCR,B	2/2; A
DX 53	6/24/99	Wheeler/BCR,B	No pneumoconiosis
DX 53	6/24/99	Scott/BCR,B	No pneumoconiosis
DX 53	6/24/99	Gayler/BCR,B	No pneumoconiosis
DX 59	6/24/99	Fino/B	1/1
DX 34	10/1/99	Aycoth/BCR,B	1/2; A
DX 59	10/1/99	Fino/B	1/1

The Board noted that Judge Tierney erred in including Dr. Aycoth's reading of the October 1, 1999 chest x-ray as a reading of complicated pneumoconiosis. Dr. Aycoth reported a "1 [centimeter] left upper lung nodule" and a Category A large opacity. The Board stated that this is insufficient to establish the presence of complicated pneumoconiosis because § 718.304(a) requires that chest x-ray show an opacity *greater than* one centimeter in diameter and a large opacity classified in Category A, B, or C to be interpreted as a reading of complicated pneumoconiosis. Thus, Dr. Aycoth's reading is not supportive of a finding of complicated pneumoconiosis.

The Board also directed Judge Tierney to consider the testimony of Dr. Cappiello and its affect on the credibility of the March 19, 1999 and March 30, 1999 chest x-rays. Dr. Cappiello testified that after reviewing the March 19, 1999 and March 30 1999 chest x-rays, he did not see a large opacity on either chest x-ray. He testified that he could identify a large opacity on the June 24, 1999 chest x-ray. Dr. Cappiello acknowledged that it is unlikely that there would be this type of progression in the intervening three month period. Dr. Cappiello then testified that complicated pneumoconiosis was "probably" there on the earlier March 1999 chest x-rays. He attributed the difference in his opinions to his "tired" eye, noting the time of the day as 4:30 in afternoon as opposed to 10:00 in the morning. I find that the doubt created by Dr. Cappiello's testimony affects the credibility of his readings of the March 19, 1999 and March 30, 1999 chest x-rays. I further find that Dr. Cappiello's suggestion that the time of day that he reads a chest x-ray affects the accuracy of his reading calls into question the credibility of all of his readings.

Finally, the Board found that Judge Tierney's logic in relying on the progressivity of pneumoconiosis is diminished, as only a few months separated the last chest x-ray taken in 1998, on November 2nd, and the first chest x-ray taken in 1999, on February 24th.

In weighing the chest x-ray evidence, I am not persuaded simply by the "number" of readings "each side" could muster. I also consider the qualifications of the readers, the dates of the films, the quality of the films, and the actual reading. As noted above, the actual reading

offered by Dr. Aycoth does not suffice to establish complicated pneumoconiosis as required by § 718.304(a). None of the films were judged to be of unreadable quality. Dr. Cappiello testified that a darker technique may have affected his reading, but also acknowledged that the time of day and sharpness of his eye were factors. I find the credibility of Dr. Cappiello's readings affected by his testimony. The Board found that this is not a case where the dates of the chest x-rays would support reliance on the progressivity argument. Aside from Drs. Aycoth and Cappiello, there remain the opinions of other dually-qualified radiological experts. These equally-qualified readers disagree as to the existence of complicated pneumoconiosis. I find that Claimant has not met his burden of proving, by the preponderance of the chest x-ray evidence, the existence of complicated pneumoconiosis under § 718.304(a).

There is no biopsy or autopsy evidence to prove the existence of complicated pneumoconiosis under § 718.304(b).

Judge Tierney next addressed the CT scan evidence in connection with § 718.304(c) – to prove the existence of complicated pneumoconiosis by other means which would yield the results described at §§ 718.304(a) or (b). Judge Tierney found that the CT scan evidence did not establish the existence of complicated pneumoconiosis and that the chest x-ray evidence outweighed the conflicting evidence in the record. The Board found several flaws in Judge Tierney's rationale with regard to the CT scan evidence, the weighing of the chest x-ray evidence against the CT scan evidence, and the failure to consider the medical opinion evidence when weighing all the evidence together. The Board vacated Judge Tierney's consideration of the CT scan evidence at § 718.304(c) and his consideration of all the evidence together pursuant to § 718.304.

There are reports of four CT chest scans. It is the interpretation of a high resolution CT scan that physicians deemed the most probative. Dr. Cappiello testified that if you really wanted to prove the existence of complicated pneumoconiosis, you would have to remove the opacity, measure it, and examine it pathologically. This would require substantial effort and subject Claimant to substantial risk (DX 50). In discussing an interpretation of a June 16, 1999 CT scan by Dr. Younis, Dr. Cappiello noted that the purpose of that report was to rule out cancer, not to diagnose pneumoconiosis. Dr. Cappiello testified that if the purpose of the scan had been to diagnose pneumoconiosis, it would have been a high resolution CT scan. Dr. Cappiello went on to state that if you wanted to rule out or rule in a diagnosis of pneumoconiosis or make a stronger case, you would have to look at the CT films themselves from the point of view of diagnosing pneumoconiosis, or subject Claimant to a high resolution CT scan. Dr. Zaldivar, a board certified pulmonary specialist, testified that a high resolution CT scan is the most precise tool available to look at small details in the lungs (DX 52). Dr. Tuteur, also a board certified pulmonary specialist, testified that he uses a CT scan when he cannot get enough information on a chest x-ray because a CT scan reveals higher resolution, less distraction, and better focus (DX 55).

Dr. Zaldivar, who examined Claimant for a second time in May 1999, requested a high resolution CT scan to rule out the existence of pneumoconiosis (DX 24). The high resolution CT scan was performed on June 9, 1999. Dr. Anton interpreted the films as showing findings that would be consistent with Claimant's history of pneumoconiosis, but added that the nodules were

prominent and recommended a follow-up CT scan in three months to document the stability of the process. Dr. Anton did not include any measurements of the nodules; he did not identify any opacities which would equate to an opacity of greater than one centimeter in diameter if chest x-rayed or equate with a massive lesion if found on biopsy or autopsy.[3] Dr. Zaldivar reviewed the actual films of the June 9, 1999 high resolution scan. It was Dr. Zalidvar's opinion that there was no evidence of nodules greater than one centimeter (DX 52). Board certified radiologists and B-readers Drs. Wheeler and Scott reviewed the films of the June 9, 1999 high resolution CT scan (DX 36). Neither identified pneumoconiosis. Dr. Wheeler specifically ruled it out. Dr. Tuteur, a board certified pulmonary specialist, reported that a Category A nodule was not confirmed on the June 9, 1999 high resolution scan (DX 49). Dr. Fino, another board certified pulmonary specialist, stated that his review of the radiographic studies included the June 9, 1999 CT scan (DX 46). He reported that there was no evidence of complicated pneumoconiosis on the CT scans.

There were reports of three other CT scans, none of which was specifically identified as a high resolution scan.

There was the June 16, 1999 scan Dr. Cappiello discussed; it was interpreted by Dr. Younis. Dr. Cappiello commented that this scan "probably" showed pneumoconiosis but he did not actually review the CT films himself (DX 50). Dr. Younis identified abnormalities consistent with occupational disease but did not mention the size of the nodules or mention the presence of complicated pneumoconiosis (DX 41). Drs. Wheeler and Scott reviewed the films of the June 16, 1999 CT scan (DX 36). Neither identified pneumoconiosis. Dr. Wheeler specifically ruled it out. Dr. Fino's review of the radiographic studies included the June 16, 1999 CT scan. He reported that there was no evidence of complicated pneumoconiosis on the CT scans (DX 46). Dr. Tuteur testified that he reviewed the June 16, 1999 films (DX 55). Dr. Tuteur did not find complicated pneumoconiosis to exist in this case.

Dr. Duren reported in April 1998 that a then-recent CT scan revealed nodular densities in the right upper lung consistent with granulomatous changes and small mediastinal nodes less than one centimeter (DX 47).

Drs. Wheeler and Scott reviewed the films of a March 12, 1999 CT scan (DX 44). Neither reader identified pneumoconiosis. Dr. Wheeler specifically ruled it out. Dr. Fino's review of the radiographic studies included the March 12, 1999 CT scan. He reported that there was no evidence of complicated pneumoconiosis on the CT scans (DX 46). Dr. Tuteur testified that he reviewed the March 12, 1999 films (DX 55). Dr. Tuteur did not find complicated pneumoconiosis to exist in this case.

The CT chest scan evidence does not demonstrate the existence of complicated pneumoconiosis as it would be described under §§ 718.304(a) or (b).

[3] Simply identifying "complicated pneumoconiosis" on the CT scan would not invoke the § 718.304 irrebuttable presumption. An equivalency determination would have to be made that what is seen on the CT scan would equate to an opacity greater than one centimeter in diameter on chest x-ray or massive lesions on biopsy or autopsy. *See Eastern Associated Coal Corp.* v. *Director, OWCP, [Scarbro],* 220 F.3d 250 (4th Cir. 2000).

There is other relevant evidence, the physician opinion evidence, which addresses the issue of the existence of complicated pneumoconiosis. The physician opinions were summarized in Judge Lesnick's decision. One physician, Dr. Rasmussen diagnosed complicated pneumoconiosis. The remaining physicians, Drs. Zaldivar, Fino, and Tuteur, rejected that diagnosis.

Dr. Rasmussen's diagnosis of complicated pneumoconiosis was based on the chest x-ray reading associated with his February 1999 exam (DX 9). Dr. Rasmussen did not have the opportunity to review the other evidence which included the conflicting chest x-ray readings and the interpretations of the CT scans. Drs. Zaldivar (DX 24, 45, 52), Fino (DX 46, 59), and Tuteur (DX 49, 55) each had the opportunity to consider the other evidence in the record including the chest x-ray evidence and the films of the high resolution CT scan. The record establishes that Drs. Zaldivar, Fino, and Tuteur are each board certified in the subspecialty of pulmonary disease; Drs. Zalidvar and Fino are certified B-readers. The record contains no similar information regarding Dr. Rasmussen. I find the opinions of Drs. Zaldivar, Fino, and Tuteur more persuasive than the opinion of Dr. Rasmussen. Claimant has not met his burden of proving, by the preponderance of the physician opinion evidence, the existence of complicated pneumoconiosis under § 718.304(c).

I have considered all of the evidence relevant to issue of the existence of complicated pneumoconiosis. I do not find the evidence sufficient to invoke the § 718.304 irrebuttable presumption. Claimant acknowledged that invocation of this presumption is his only avenue to entitlement. As the § 718.304 presumption is not invoked, I deny Claimant's request for modification.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim of Wesley Eugene Clark for benefits under the Act is denied.

A

MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).